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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-6272

SAMUEL ED ROBINSON,
Petitioner,

v.

WILLIAM S. NEIL, Warden, Tennessee
State Penitentiary,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

The sole question presented on this appeal is:

Whether **Waller v. Florida**, 397 U.S. 387 (1970), abrogating the "dual sovereignty" doctrine with respect to criminal prosecutions by the States, should be applied retroactively.

STATEMENT OF THE CASE

The facts in the present case are similar to the facts in **Waller v. Florida**, 397 U.S. 387 (1970). In 1962, Robinson was tried and convicted in the Chattanooga, Tennessee municipal court of three assault and battery offenses in violation of a municipal ordinance. He was fined \$50.00 and costs for each offense.

Subsequently, he was named in three indictments charging assault with intent to commit first degree murder arising out of the same facts on which the municipal convictions had been based. Following arraignment in the state court of general jurisdiction, he entered a plea of guilty to each charge and received two consecutive sentences of two to ten years and one consecutive sentence of three to five years. He is presently confined in the Tennessee State Penitentiary at Nashville.

In July, 1966, Robinson filed a petition for a writ of habeas corpus in the Criminal Court of Davidson County, Tennessee, contending that the state court convictions violated the Double Jeopardy Clause of the Fifth Amendment in that they stemmed from the same facts as the municipal court convictions. The Tennessee state court denied the petition. The Tennessee Supreme Court affirmed.

Robinson filed a petition for habeas corpus relief in the United States District Court in March, 1967, again advancing the double jeopardy argument. That court denied the petition on the ground that under **Palko v. Connecticut**, 302 U.S. 319 (1937), the Double Jeopardy Clause of the Fifth Amendment was not applicable to the States through the Fourteenth Amendment. **Robinson v. Henderson**, 268 F.Supp. 439 (E.D. Tenn. 1967), *aff'd* 391 F.2d 933 (6th Cir. 1968).

Soon thereafter, **Palko v. Connecticut**, *supra*, was overruled by **Benton v. Maryland**, 395 U.S. 784 (1969), which held that the Fifth Amendment double jeopardy provision was applicable to the States. Following **Benton v. Maryland**, the court decided **Waller v. Florida**, 397 U.S. 387 (1970), which abrogated the "dual sovereignty" doctrine with respect to States and municipalities. Robinson filed a new habeas corpus petition in federal court. The District Court, holding **Waller** should be applied retroactively, granted Robinson habeas corpus relief. **Robinson v. Neil**, 320 F.Supp. 894 (E.D. Tenn. 1971). This was reversed by the United States Court of Appeals for the Sixth Circuit. **Robinson v. Neil**, 452 F.2d 370 (6th Cir. 1971).

SUMMARY OF ARGUMENT

This Court's approach to giving new constitutional standards retroactive effect has undergone several changes since first articulated in **Linkletter v. Walker**, 381 U.S. 618 (1965). The three traditional elements of **Linkletter** are still applied, but since **Desist v. United States**, 394 U.S. 244 (1969), the Court has consistently maintained that it is the purpose of the new constitutional rule which determines its retroactivity. When the purpose of the new rule is to eliminate elements in the trial which substantially impair its truth-finding function, the Court has given the new standard retroactive effect. **Williams v. United States**, 401 U.S. 646 (1971).

In addition to the "determination of purpose" approach, this Court has also held that the effect of a new constitutional rule, if found to be basically prospective in nature, will only extend to cover those acts occurring after the announcement of the new rule. **Desist v. United States**, 394 U.S. 244 (1969).

Waller v. Florida, 397 U.S. 387 (1970), closely resembles those decisions which have not been accorded retroactive

effect. **Adams v. Illinois**, 405 U.S. 278 (1972); **Williams v. United States**, 401 U.S. 646 (1971); and **DeStephano v. Woods**, 392 U.S. 631 (1968). While these decisions deal with rights that have been labeled "fundamental," the Court determined these new rules were not designed to protect the reliability of the fact-finding process.

The purpose of **Waller** was to eliminate the "Dual Sovereignty" doctrine. This diminishes the possibility of prosecutorial misconduct and judicial harassment by limiting the State's opportunity to prosecute an individual. **Waller** did not say that the result of the second state prosecution was invalid; it merely said that the institution of the second action was improper. Thus **Waller** did not deal with the integrity of the fact-finding process, rather, it compelled the States to abandon the long-tolerated practice of successive prosecutions.

When the purpose of the new rule does not absolutely demand retroactivity, this Court has also considered the possible effect of the new rule on the administration of justice as well as the extent of reliance on the old constitutional rule. There is ample evidence that many States had permitted multiple prosecutions by municipalities and the State at the time **Waller** was decided. Justice does not presently demand that this Court rule the States should have been able to anticipate **Waller**. Further, there are a sufficient number of jurisdictions which would be substantially affected by any retroactive application of **Waller** to justify giving the **Waller** rule prospective effect only. See generally, **Tehan v. United States ex rel. Shott**, 382 U.S. 406, 417-418 (1966) (where nonretroactivity was favored even though only six states were involved and data was not available to determine the actual number of cases within those six states).

Finally, this Court should recognize and follow its long-standing policy of declining to overturn convictions need-

lessly. **Jenkins v. Delaware**, 395 U.S. 213 (1969). Nowhere does petitioner allege his conviction was obtained by a procedure which did not comply with then-recognized constitutional standards. Nowhere does the petitioner protest his innocence; in fact, Robinson entered a plea of guilty in the state proceeding. This, coupled with the fact that the purpose of the **Waller** rule does not demand retroactive application, is sufficient ground for this Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I. Successive Prosecutions in State Criminal Proceedings Permitted by the "Dual Sovereignty" Doctrine Did Not Affect the Reliability of the Fact-Finding Process of the Second Trial.

A. The judicial development of retroactivity guidelines.

The present standard for determining whether new constitutional rules of criminal procedure should be accorded retroactivity invokes a consideration of three factors; first, the purpose of the new constitutional rule; second, the extent of reliance on the old constitutional rule; and finally, the impact on the administration of justice of the new rule's retroactive application. **Linkletter v. Walker**, 381 U.S. 618, 636 (1965). **Linkletter** held the rule announced in **Mapp v. Ohio**, 367 U.S. 643 (1961), should not be applied retroactively to those convictions that had become final before the date of the **Mapp** decision. In this Court's discussion of the retroactivity issue, Mr. Justice Clark stated:

"In short, we must look to the purpose of the **Mapp** rule; the reliance placed upon the **Wolf** doctrine; and the effect on the administration of justice of a retroactive application of **Mapp**."

Linkletter v. Walker, *supra*, 381 U.S. at 636.

This Court has consistently utilized the standard announced in **Linkletter** for determining the retroactivity of new constitutional rules of criminal procedure. **Adams v. Illinois**, 405 U.S. 278 (1972); **Desist v. United States**, 394 U.S. 244 (1969); **DeStefano v. Woods**, 392 U.S. 631 (1968); **Stovall v. Denno**, 388 U.S. 293 (1967); **Johnson v. New Jersey**, 384 U.S. 719 (1966); and **Tehan v. United States ex rel. Shott**, 382 U.S. 406 (1966).

Of the three elements in the *Linkletter* standard, the "purpose" element has become the controlling factor on the issue of retroactivity. In *Desist v. United States, supra*, the Court in analyzing the issue of retroactivity stated:

"Foremost among these factors is the purpose to be served by the new constitutional rule."

394 U.S. at 241.

The Court stated further:

"It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity."

394 U.S. at 251.

The guideline for determining when the purpose of a new constitutional rule conclusively favors retroactivity was announced in *Williams v. United States*, 401 U.S. 646 (1971). The Court stated that complete retroactivity would be accorded only when the purpose of the new constitutional rule was to eliminate an element in the criminal trial that "substantially impairs its truth-finding function." *Williams v. United States, supra*, 401 U.S. at 653.¹

¹ This guideline was also followed in *Adams v. Illinois*, 405 U.S. 278 (1972), holding *Coleman v. Alabama*, 399 U.S. 1 (1970), would not be applied retroactively; *Mackey v. United States*, 401 U.S. 667 (1971), holding *Marchetti v. United States*, 390 U.S. (1968) and *Grosso v. United States*, 390 U.S. 62 (1968), were not retroactive; *Hill v. California*, 401 U.S. 797 (1971), *Williams v. United States* and *Elkanich v. United States*, 401 U.S. 646 (1971) holding *Chimel v. California*, 395 U.S. 752 (1969) was not retroactive; and *Fuller v. Alaska*, 393 U.S. 80 (1968) holding *Lee v. Florida*, 392 U.S. 378 (1968) was not retroactive. These decisions stated that the new procedural standards being construed were not intended to remedy serious flaws in the fact-finding process.

The critical question is whether the purpose of the rule announced in **Waller** substantially eliminates prejudicial error in the fact-finding process.

B. To accord a new constitutional rule retroactivity, the purpose of the new rule should substantially affect the reliability of the fact-finding process.

It is misleading to suggest that any decision announcing a new constitutional rule of criminal procedure has only one purpose. However, **Waller v. Florida** suggests the major thrust of that decision was the abolition of the "Dual Sovereignty" doctrine in state criminal prosecutions.

In **Waller**, Mr. Chief Justice Burger recognized that the doctrine of "Dual Sovereignty", allowing a state and a municipality to impose separate punishments in separate prosecutions for the same offense, had been supported previously by the States' reliance on two earlier cases, **Bartkus v. Illinois**, 359 U.S. 121 (1959) and **Abbate v. United States**, 359 U.S. 187 (1959). **Bartkus** and **Abbate** upheld successive prosecutions for the same criminal offense by federal and state courts as instrumentalities of separate sovereigns. In **Waller**, however the Court stated that the States' reliance on **Bartkus** and **Abbate** as justifying successive prosecutions for the same offense by State and municipal courts was misplaced. A municipality should be considered not as a separate sovereign but rather as an instrumentality of the State. **Reynolds v. Sims**, 377 U.S. 533 (1966).

Waller considered the State-municipality relationship akin to the relationship between the United States and a territory of the United States. Since the Court had forbidden successive prosecutions by a federal court and a territorial court of the federal government as acts of the

same sovereign in *Grafton v. United States*, 206 U.S. 333 (1907), the Court by implication, could also prohibit similar acts by the States and their municipalities. *Waller v. Florida*, *supra*, 397 U.S. at 394, 395.

Waller abrogated the long-standing rule under which municipalities were considered separate sovereigns, capable of imposing separate criminal punishments. The effect of *Waller* is to prohibit future successive criminal prosecutions for the same offense by the States, thereby limiting the States to one forum. The purpose of *Waller* is to dismantle the "Dual Sovereignty" fiction which had supported subsequent state criminal prosecutions.

Waller was not intended to remove an element from the criminal trial that impaired the truth-finding process, and therefore should not be afforded retroactivity. A comparison of *Waller* with other cases in which this Court has accorded retroactivity to new constitutional rules reveals *Waller* is not the type of case which affects the fact-finding process. As the Court stated in *Waller*:

"We decide only that the Florida courts were in error to the extent of holding that, 'even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such a person in the proper state court'."

Waller v. Florida, *supra*, 397 U.S. at 395.

Waller intimates no inaccuracy in the verdict. In no manner does it imply that *Waller* did not receive a fair trial in the subsequent state prosecution. These two policy considerations found in other cases where retroactivity was granted do not appear in the instant case or in *Waller*.

The Court in *DeStephano v. Woods*, 392 U.S. 631 (1968), declined to grant retroactivity to *Duncan v. Louisiana*,

391 U.S. 145 (1968) and *Bloom v. Illinois*, 391 U.S. 194 (1968), holding that the fundamental right to a jury trial should be extended to the States. Retroactivity was denied because the absence of a jury did not create a serious flaw in the fact-finding process. The Court recognized that a retroactive extension of the right to a jury trial would greatly burden the administration of justice. The Court conceived the purpose of jury trials as generally tending to prevent arbitrariness and repression. *DeStephano v. Woods*, *supra*, 392 U.S. at 633.

Benton v. Maryland, 395 U.S. 784, 796 (1969), also equated the right to trial by jury with the prohibition against double jeopardy. The Court stated that the retroactivity of such fundamental rights must be determined using current standards. *Waller*, as a refinement of *Benton*, also states that the purpose of that decision is to prevent arbitrary and repressive acts by the State. Thus *Waller*, by analogy, should be accorded the same treatment as *DeStephano v. Woods*.

C. Waller v. Florida and *Ashe v. Swenson* represent two different aspects of the Double Jeopardy Clause of the Fifth Amendment.

Since *Linkletter*, only one decision involving double jeopardy, *Benton v. Maryland*, 395 U.S. 784 (1969), has been given full retroactivity. *Benton* bars a second prosecution for the same offense after acquittal on the ground that such action violates the Double Jeopardy Clause of the Fifth Amendment.²

² The full retroactive application of *Benton*, is obscured by a conflict between footnotes in *Price v. Georgia*, 398 U.S. 323 (1970) and *Waller v. Florida*, 397 U.S. 387 (1970). Compare *Price v. Georgia*, *supra*, 398 U.S. at 330, n. 9, with *Waller v. Florida*, *supra*, 397 U.S. at 391, n. 2, citing *Ashe v. Swenson*, 397 U.S. 436, 437, n. 1 (1970).

The integrity of the fact-finding process and the accuracy of the jury's verdict were critical issues in **Benton**. **Benton** was first convicted of burglary but acquitted of larceny. An appeal resulted in a new trial. At the second trial, he was found guilty of both burglary and larceny. This Court reversed, holding the second trial for larceny after the prior acquittal violated the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. **Waller** and this case are akin to **Benton** only in that they involve the Fifth Amendment and double jeopardy. Critical differences justify the retroactivity of **Benton** but militate against the retroactivity of **Waller**. The basic difference is **Robinson** was found guilty in the municipal proceeding and then entered a voluntary plea of guilty in the State proceeding. The integrity of the fact-finding process is not at issue.

Waller v. Florida and **Ashe v. Swenson** are refinements of **Benton's** broad holding. They deal with two different situations which may give rise to double jeopardy questions; first, a second trial following a guilty verdict by an inferior court; second, a second trial following a not guilty verdict by a court of concurrent jurisdiction. **Ashe v. Swenson** is more akin to **Benton v. Maryland** because both cases deal with convictions following acquittals, leaving little doubt that **Ashe v. Swenson's** doctrine of "constitutional collateral estoppel" falls under the ambit of **Benton's** retroactivity rule.³

The same cannot be said for **Waller**. The common element in **Benton**, **Waller** and the instant case is the petitioner in each case faced two trials. The similarities end at this point and the cases become distinguishable. The first **Benton** jury found **Benton** not guilty of larceny. The second jury, using the same evidence, found **Benton** guilty of the same larceny charge. These contradictory verdicts

³ See also, **Harris v. Washington**, 404 U.S. 55 (1971).

on the same charge of larceny, using the same evidence, dealt an injurious blow to the integrity of the first fact-finding process and presented a serious dilemma.

It was the State's act of subjecting Benton to a second trial on the same charge for which he had been previously acquitted that the Court found so objectionable to the fundamental fairness of the American system of justice. Thus, the Court extended the Fifth Amendment provision against double jeopardy to the States, thereby overruling **Palko v. Connecticut**, 302 U.S. 319 (1937). The State's twice subjecting Benton to jeopardy was worsened by the guilty verdict at the second trial which impugned the integrity of the first fact-finding process. For this reason **Benton** was accorded full retroactivity. **Benton** is intended to eliminate an element in the criminal trial which "substantially impairs its truth finding function and so raises serious question about the accuracy of guilty verdicts in past trials . . ." **Williams v. United States**, 401 U.S. 646, 653 (1971).

Benton differs from **Waller** in this fundamental respect. Since neither **Waller** nor the instant case calls the accuracy of the first verdict into question, the **Benton** rationale, more closely akin to **Ashe v. Swenson**, 397 U.S. 436 (1970), should not be controlling when determining **Waller's** retroactivity.

D. The purpose of *Waller v. Florida* is to limit the States to one forum for criminal prosecutions by abrogating the "Dual Sovereignty" doctrine.

The purpose of **Waller v. Florida** is to limit the States to one forum for criminal prosecutions by abrogating the "Dual Sovereignty" doctrine which had permitted subsequent state prosecutions for offenses previously litigated in municipal courts. **Waller** did not speak concerning the validity of the procedure used to reach the result of the

second state trial; rather, it stands for the proposition that the second trial by the State subjects the petitioner to jeopardy for the second time, thus violating the Double Jeopardy Clause of the Fifth Amendment. Subsequent to **Waller**, second prosecutions are barred as a matter of public policy. The State must now prosecute the petitioner only once for the same offense.

Waller and the case at bar present identical situations. Each petitioner had been found guilty of violating a municipal ordinance in a municipal court, and each was subsequently tried in state court. Robinson entered a plea of guilty to the charge at his second trial. **Waller** and Robinson are not innocent men forced to stand a second trial for an offense of which they were previously acquitted, as was the case in **Benton**. They were convicted in proceedings which conformed to all then-applicable constitutional norms. **Williams v. United States**, *supra*, 401 U.S. 656. It is subjecting an individual who has been found innocent to another trial on the same charge following an acquittal by another court of equal jurisdiction that offends the American sense of justice, not the situation presented here.

Although **Waller** and the instant case do not involve subjecting an innocent man to a second trial on the same criminal charge, this Court found unconstitutional the State's successive criminal prosecutions under the "Dual Sovereignty" doctrine. It is not here contended that **Waller** does not fall within the ambit of **Benton**. As this Court stated in **Waller**:

"Here as in **North Carolina v. Pearce**, . . . **Benton** should be applied to test petitioner's conviction, although we need not and do not decide whether each of the several aspects of the constitutional guarantee against double jeopardy requires such application in similar procedural circumstances."

Waller v. Florida, *supra*, 397 U.S. at 390, 391.

By stating that **Benton** should be applied, the Court meant that the Double Jeopardy Clause of the Fifth Amendment should be applied to the States. However, **Benton** and **Ashe v. Swenson** involve the integrity of the fact-finding process while **Waller** involves unnecessary governmental harassment. **Benton** itself supports the position that **Waller** does not involve the integrity of the truth-finding function of a criminal trial, and therefore, should not be accorded retroactivity.

The petitioner in **Benton** requested the Court to vacate his burglary conviction although he had been tried twice on the same burglary charge and had been found guilty twice. The two trials for burglary are closely akin to **Waller** and the instant case. If the **Benton** Court had considered Benton's second trial on the burglary charge after a prior guilty verdict on the same burglary charge as substantially impairing the integrity of the fact-finding process or as violating the fundamental fairness of American justice, the Court could have vacated the burglary conviction as well. But instead, the case was remanded for an evidentiary hearing.⁴ Such an action by the Court indicates that once an accused has been found guilty of a criminal charge, a second trial on the same criminal charge does not affect the fundamental fairness of the trial, subject to the restrictions of **North Carolina v. Pearce**, 395 U.S. 711 (1969). Thus, it appears from this Court's action on the burglary trials in **Benton** that successive criminal prosecutions under the "Dual Sovereignty" theory are not the kind of acts that significantly impair the truth-finding function of the criminal trial or violate the funda-

⁴ On remand, Benton's burglary conviction was reinstated and affirmed. The Court of Special Appeals of Maryland held that the record did not disclose any evidence that had been admitted at the first trial that could not have been admitted against Benton had the trial been for burglary alone. **Benton v. State**, 8 Md.App. 388, 260 A.2d 86 (1969).

mental fairness of American justice. Therefore, the abrogation of "Dual Sovereignty" should not be accorded full retroactive application.

The rule in **Waller** should be accorded the same application as suggested by this Court's decision in **Desist v. United States**, *supra*. Thus, the **Waller** rule should apply only to those cases in which the prohibited act occurred after the decision.

II. The Abolition of the "Dual Sovereignty" Doctrine Should Not Be Extended to Those Individuals Whose Trials Took Place to *Waller v. Florida*.

In conjunction with the resolution of the "purpose" issue, the Court must also consider to whom the new constitutional rule will apply. In several cases refusing to give a new rule retroactive effect, the Court has differed concerning which parties should be affected by the new rule. This divergence of opinion has resulted in the Court's granting limited retroactivity to decisions which were basically prospective in nature. Thus in **Linkletter**, the Court extended the **Mapp** rule only to those cases on direct review at the time **Mapp** was decided:

"All that we decide today is that though the error complained of might be fundamental it is not of the nature requiring us to overturn all final convictions based on it."

Linkletter v. Walker, *supra*, 381 U.S. at 639, 640.

The **Linkletter** approach was also followed in **Tehan v. United States ex rel. Shott**, 382 U.S. 406 (1966).

In **Johnson v. New Jersey**, 384 U.S. 719 (1966), the Court announced a new guideline to determine which parties would benefit from new constitutional rules announced by the Court. There the Court limited the **Escobedo** and

Miranda rules to cases in which the trials commenced subsequent to the announcement of those new constitutional rules. **Johnson v. New Jersey**, *supra*, 384 U.S. at 734. This rule was later amplified in **Jenkins v. Delaware**, 395 U.S. 213 (1969), which held that since cases originally commenced before **Miranda** were not within the scope of **Johnson v. New Jersey**, the **Miranda** and **Escobedo** rules did not apply to retrials of those earlier cases commenced after the date of the **Miranda** decision.

The scope of a new rule's application was again narrowed in **Stovall v. Denno**, 388 U.S. 293 (1967), where this Court held, in part, that the rule requiring the right to counsel at pretrial identifications was applicable only to those cases in which the confrontation occurred after the announcement of **Gilbert v. California**, 388 U. S. 263 (1967) and **United States v. Wade**, 388 U.S. 218 (1967). In like manner, this Court later held in **Desist v. United States**, 394 U.S. 244 (1969) that the rule excluding evidence from electronic surveillances conducted without prior judicial authorization applied only where the prohibited act occurred after the decision in **Katz v. United States**, 389 U.S. 347 (1967). **Desist** embodies this Court's present position concerning which parties will be affected by a new constitutional rule once the rule is not accorded retroactivity.

III. The States' Strict Interpretation of This Court's Previous Decisions Construing the Double Jeopardy Clause of the Fifth Amendment Was Justified.

A. Prior to **Benton v. Maryland**, **Palko v. Connecticut** exempted the states from the coverage of the Double Jeopardy Clause of the Fifth Amendment.

It was not until **Benton v. Maryland** that the Double Jeopardy Clause of the Fifth Amendment was incorpo-

rated into the Fourteenth Amendment and thereby made applicable to the States. Prior to **Benton v. Maryland**, the Court had held in **Palko v. Connecticut** that the Double Jeopardy Clause of the Fifth Amendment was not applicable to the States. **Palko v. Connecticut**, 302 U.S. 319 (1937). The States cannot be held accountable for not meeting federal standards of double jeopardy without a clear mandate from this Court. The State's reliance on **Palko v. Connecticut** was not without reasonable basis. Thus, since Robinson's successive trials were held prior to **Benton**, the State was without notice that such successive criminal prosecutions for the same offense were unconstitutional.

B. The States' reliance on the "Dual Sovereignty" doctrine as supporting successive criminal prosecutions did not conflict with either **Palko v. Connecticut** or **Benton v. Maryland**.

Although the Tennessee Supreme Court had held that municipalities were only arms of the State,⁵ it was well established that municipalities could enact ordinances as long as such ordinances did not conflict with the general law of the State and were reasonable. **Foreman v. City of Nashville**, 127 Tenn. 509, 156 S.W. 189 (1913). Prior to **Waller**, there was no constitutional authority stating that state courts and the courts of their municipalities would commit constitutional error by conducting successive criminal trials for the same criminal offense. In the absence of a constitutional directive to the contrary, Tennessee and other states adopted successive criminal prosecution procedures similar to those used by federal and state govern-

⁵ **Nashville C. & St. L. Ry. v. Marshall County**, 161 Tenn. 236, 30 S.W.2d 268 (1930).

ments.⁶ Successive criminal prosecutions in the federal and state courts for the same criminal offense were upheld as acts of separate sovereigns in *Bartkus v. Illinois*, *supra*, and *Abbate v. United States*, *supra*. It was not unreasonable for States and municipalities to view themselves as being in a position similar to the federal-state relationship since both State and municipal governments had separate criminal provisions. The Sixth Circuit noted below that even though all States have some form of guarantee against double jeopardy [see *Mulreed v. Kroop*, 425 F.2d 1095, 1098 (6th Cir. 1970)], either constitutional, statutory, or by the common law, nearly half of them permitted multiple prosecutions by municipal

⁶ The Tennessee Supreme Court in *Mullins v. State*, 214 Tenn. 366, 368-369, 380 S.W.2d 201, 202 (1964), said:

"There are certain acts which constitute offenses against more than one sovereign and trial in the courts of one sovereign, of course is not a bar to trial in the courts of another sovereign. *Sizemore v. State*, 40 Tenn. 26; *Coleman v. Tennessee*, 97 U.S. 509, 24 L.Ed. 1118; *Greenwood v. State*, 65 Tenn. 567. An excellent note on this question will be found in 174 A.L.R., beginning at page 1343, where cases from many jurisdictions are annotated. In reading this annotation we find the following on page 1347, quoting from an opinion of the Supreme Court of Florida. That court said:

"Some courts have sustained this view, but the overwhelming weight of authorities, with which our views accord, support the contrary rule, that there is no impropriety, from a constitutional standpoint, in clothing our municipal governments with legislative power to prohibit and punish by ordinance any act made penal by the state laws, when perpetrated within the municipal limits; and that it is no objection to such an ordinance that it prescribes the same penalties as the state law for the commission or omission of the same act; and that the offender may be tried and punished for the same act under both the ordinance and the state law; and that a conviction or acquittal under the one is no bar to prosecution under the other; and that it is no objection to the municipal ordinance that the trial thereunder is without a jury." [*Theisen v. McDavid*, 34 Fla. 440, 16 So. 321 (1894)]

Our authorities are to the same effect."

palities and the State at the time **Waller** was decided. **Waller v. Florida**, *supra*, 397 U.S. at 391, n. 3. **Waller** simply compelled the States to abandon the long tolerated practice of successive prosecutions based on standards of double jeopardy. The States, in the absence of any clear constitutional mandate to the contrary, should not be faulted for failing to anticipate **Waller v. Florida**.

IV. The Impact on the Administration of Justice Is Sufficient to Warrant Denying Retroactive Application to **Waller v. Florida**.

The survey of the effect of a retroactive application of **Waller** was inconclusive. Replies from twenty-six of the fifty States are inadequate to measure the effect on the administration of justice of a retroactive application of **Waller**. Tennessee (App., pp. 21, 26) and Washington (App. 61) indicated a substantial interest in a prospective application of **Waller**. See, *e.g.* **Douglas v. Nixon**, 459 F. 2d 325 (6th Cir. 1972), *certiorari pending*, holding the present case bars relief from successive municipal-state drunk driving prosecutions. Further, in **Tehan v. United States ex rel. Shott**, *supra*, this Court refused to grant retroactive applications even though only six States would be adversely affected. The data with respect to Washington and Tennessee provide a basis for denying retroactive application of **Waller**.

A survey of State decisions since **Waller** reveals that the abrogation of "dual sovereignty" has had a demonstrable effect on the administration of justice.

Williamson v. State, 474 P.2d 139 (Okla.Crim.App. 1970), is typical. Williamson pleaded guilty in the Tulsa municipal court to larceny of four boxes of sparkplugs worth \$600.00. He was fined \$25.00 and sentenced to ten days in

jail. Subsequently, he was tried by the State for stealing sparkplugs from the same store on the same date. The State used the same evidence that led to conviction in the municipal court. The defendant's motion for double jeopardy was overruled and he was found guilty and sentenced to eighteen months in prison. The Oklahoma court held that the second conviction was invalid because of **Waller**. See also **State v. Stiefel**, 256 So.2d 581 (Fla. App. 1972) and **Barrett v. State**, 478 P.2d 1016 (Okl. Crim. App. 1970), holding invalid sentences imposed in state court subsequent to a municipal prosecution.

Retroactive application of **Waller** will create an anomalous situation where defendants convicted of identical offenses will receive unequal punishment merely because some individuals were also tried in municipal courts. The preceding **Williamson** case from Oklahoma demonstrates this. Had **Williamson** been tried by the State alone, his eighteen month sentence would be valid. But since he had received a nominal fine and ten-day sentence, the court was forced to release him before he had served his entire second sentence. Should **Waller** be applied retroactively, the States would be compelled to release some individuals convicted of serious crimes merely because they had been convicted of a petty offense in a lower municipal court. Justice does not demand this result. Indeed, this is a violation of the Equal Protection Clause of the Fourteenth Amendment.

In a similar case from Illinois, the defendant King was charged under municipal ordinances with (1) fighting, and (2) indecent conduct. He entered a plea of guilty to the charge of fighting on December 2, 1968; thereafter, evidence was heard on the charge of indecent conduct, and the case was taken under advisement. Subsequently, in January, 1969, the defendant was indicted by the state for deviate sexual assault. Prior to his trial in April,

1969, his motion to bar this prosecution on the grounds of double jeopardy was denied. The record reveals that on December 19, 1969, the city attorney moved to strike the "indecent conduct" cause of action for the reason that the "defendant is serving a penitentiary sentence of indecent conduct in this cause." The Illinois Appellate Court held that the defendant's subsequent conviction for deviate sexual conduct was barred because jeopardy had attached at the prior evidentiary hearing conducted by the municipal court. **People v. King**, 1 Ill.App.3d 757, 275 N.E.2d 213, 214 (1971). Accord, **People v. Allison**, 46 Ill. 2d 147, 263 N.E.2d 80 (1970).

The state courts have given **Waller v. Florida** varying interpretations in order to limit its effect. Some have held that **Waller** does not apply to different offenses arising out of the same transaction when there is a lack of "identity of offenses." **State v. Hoffman**, ___ S.C. ___, 186 S.E. 2d 421 (1972); **Cox v. State**, 208 Kan. 190, 490 P.2d 381 (1971); **State v. Conrad**, 243 So.2d 174 (Fla.App. 1971); **State v. Miller**, ___ Ore. ___, 484 P.2d 1132 (1971); and **State v. Hill**, 254 S.C. 321, 175 S.E.2d 227 (1970). Other courts have held that **Waller** will not apply to second prosecutions which require proof of additional facts. **Culberson v. State**, 247 So.2d 68 (Fla.App. 1971); **Martinez v. People**, ___ Colo. ___, 484 P.2d 792 (1971); and **State v. McDonald**, ___ Mont. ___, 491 P.2d 711 (1971). Finally, several jurisdictions have held **Waller** inapplicable to situations where the municipal court had no jurisdiction over the later charges. **People v. Taylor**, 322 N.Y.S.2d 818 (1971) and **State v. R.E.F.**, 251 So.2d 672 (Fla.App. 1971).

These cases demonstrate the States' attempts to integrate **Waller** into their precedents without greatly disrupting their judicial systems. A retroactive application of **Waller** would only serve to cause increased difficulty in the administration of justice in the several states.

V. The Petitioner's Valid Conviction Should Be Accorded Finality and Should Not Be Overturned Needlessly.

Robinson is collaterally attacking a valid conviction. He was found guilty of three offenses of assault and battery in violation of the municipal ordinances of Chattanooga, Tennessee. In his trial in state court he entered pleas of guilty to three counts of assault and battery with intent to commit first degree murder. His guilty plea in the state court removes any possible prejudicial effect the municipal conviction may have had on his subsequent conviction in state court. He exhausted his state post-conviction remedies and was first denied federal habeas corpus relief in **Robinson v. Henderson**, 268 F.Supp. 349 (E.D. Tenn. 1967), *aff'd*, 391 F.2d 933 (6th Cir. 1968). Here he is again raising the double jeopardy question, even though Tennessee has been told by the federal courts that its procedures were constitutional.

Robinson does not attack the validity of his conviction. He does not allege or demonstrate prejudice by successive trials in the state and municipal courts. He does not protest his innocence. This Court has recognized that "... society's legitimate concern that convictions already validly obtained [should] not be needlessly aborted..." **Jenkins v. Delaware**, 395 U.S. 213, 219 (1969). This Court has refused to apply a new constitutional rule of criminal procedure where the petitioner was unable to demonstrate actual prejudice. **Adams v. Illinois**, 405 U.S. 278 (1972). Society's legitimate concern in enforcing the state's criminal sanctions upon an admittedly guilty individual and in upholding a valid conviction should prevail in the absence of any showing of prejudice by the petitioner, especially when it appears that the petitioner's conviction satisfied every then-existing constitutional requirement.

CONCLUSION

For the foregoing reasons the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

Bart C. Durham III

BART C. DURHAM, III

Assistant Attorney General

211 Supreme Court Building

Nashville, Tennessee 37219

Telephone: (615) 741-2091

Of Counsel:

DAVID M. PACK

Attorney General

WILLIAM C. KOCH, JR.

Assistant Attorney General

411 Supreme Court Building

Nashville, Tennessee 37219

Telephone: (615) 741-1671

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